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No. 96-1824

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

GARY LEE, M.D., *et al.*,
Petitioners,
v.
DOUGLAS F. HARCLEROAD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE; THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE EVANGELICAL LUTHERAN CHURCH IN AMERICA; THE NATIONAL ASSOCIATION OF EVANGELICALS; THE EVANGELICAL COVENANT CHURCH; THE AMERICAN MUSLIM COUNCIL; THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES; THE CHRISTIAN LEGAL SOCIETY; AND THE CHRISTIAN MEDICAL & DENTAL SOCIETY, IN SUPPORT OF PETITIONERS

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Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae* herein, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

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INTEREST OF AMICI

This case involves a law that is both unprecedented and chilling. In 1994, by the narrowest of margins (51 to 49%), the citizens of Oregon voted to remove some of their fellow citizens from the coverage of the criminal and civil laws that protect human life from assisted suicide. Commonly referred to by its number on the ballot, Oregon's Measure 16 not only erects the lethal machinery for taking the lives of those who are sick, depressed, and vulnerable, but also requires that physicians and other health care providers who oppose assisted suicide on religious grounds participate in such conduct by associating with those who have no such objection, by transferring medical records to those who will help the patient take his or her own life, by appointing witnesses necessary for the assisted suicide to take place, and by providing their suicidal patients with information regarding the availability of assisted suicide.

This case therefore represents not only a tragic affront to human life, but an assault upon the religious convictions of countless physicians and health care institutions whose health care goals are deeply opposed to facilitating the taking of human life. Oregon's law has been enjoined since 1994 while a challenge to its validity by, among others, religious health care providers, proceeded. A panel of the United States Court of Appeals for the Ninth Circuit reversed, finding that none of the petitioners -- not the terminally ill patients, nor their physicians, nor other health care providers -- may test the validity of the very law designed to take the patients' lives. Without action by this Court, the rights and lives of the terminally ill will be ended, and the rights of their caregivers will be gravely impaired. This case must go forward now. These amici, representatives of various religious traditions, urge this Court to grant certiorari so that this important case may go forward toward a decision on the merits by the lower courts:

The United States Catholic Conference is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference is a vehicle through which the Bishops speak cooperatively and collegially on matters affecting the Catholic Church and its people. Roman Catholicism is the largest religious denomination in the Nation, with over 61 million members in the United States. The Conference advocates and promotes the pastoral teaching of the Church on diverse issues, including the protection of human rights and the sanctity and dignity of human life.

The Christian Life Commission is the moral concerns and public policy agency for the Southern Baptist Convention, the Nation's largest Protestant denomination, with over 15.2 million members in over 38,000 autonomous local churches. The Commission is charged with addressing public policies affecting the sanctity of human life.

The Evangelical Lutheran Church in America ("ELCA") is the largest Lutheran denomination in North America and the fifth largest Protestant body in the United States. It has approximately 11,000 member congregations which in turn have approximately 5.2 million individual members. Its affiliated Oregon Synod has 123 congregations with 48,748 individual members. On November 11, 1992, the ELCA Church Council, which is the church's board of directors, adopted a "Message on End-of-Life Decisions" stating its opposition to physician-assisted suicide.

The National Association of Evangelicals ("NAE") is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 42,500 churches from 75 denominations, and 300 parachurch ministries. NAE has joined in this and many other *amicus* briefs in the defense of human life.

The Evangelical Covenant Church ("ECC") is a Protestant denomination with 92,000 members in 600 churches throughout the United States. It operates a university, two hospitals, twelve continuing care and retirement communities, and twelve nursing homes as a Christian ministry. ECC has adopted an ethical guideline on death and euthanasia. The guideline affirms the ECC's commitment to provide "the best palliative measures we can to relieve the pain, discomfort, and suffering of our patients.... We do not act in any way intentionally to cause, assist, or accelerate the death of patients."

The American Muslim Council ("AMC") is a national organization representing the interests of the American Muslim community. AMC is a committed advocate of human rights. It participates in interfaith and multiethnic dialogue with the hope of promoting an environment in which tolerance and justice will thrive. AMC's opposition to assisted suicide is rooted in Islamic belief, which strongly affirms the sanctity of human life.

The Catholic Health Association of the United States is a national Catholic association consisting of U.S. Catholic hospitals and long term care facilities, their sponsoring organizations and systems, and other health and related agencies and services operated as Catholic facilities. CHA's members include approximately 542 Catholic sponsored hospitals, 321 long term care facilities, 61 health care systems, 266 sponsors, which include congregations of Catholic women and men religious and dioceses involved in health care delivery, 262 personal members, and 80 health related organizations. In Oregon, 13 of the State's 71 hospitals, or 18%, are Catholic hospitals.

Founded in 1961, the Christian Legal Society ("CLS") is a nonprofit association of 4,000 Christian attorneys, law professors, and law students with chapters in every state and at 85 law schools. CLS's legal advocacy and information arm, the Center for Law and Religious Freedom, advocates for the protection of religious exercise and the sanctity of human life in federal and state courts nationwide. Many CLS member attorneys must advise health care professionals who have religious objections to collaborating with assisted suicide.

Founded in 1931, the Christian Medical & Dental Society ("CMDS") today has 11,000 members, consisting primarily of practicing physicians in the entire range of medical specialties. Its members share a common commitment to the principles of biblical faith and the integration of those principles with professional practice. Members of CMDS are committed to protecting the lives and best interests of their patients, to ensuring that medicine is practiced conscientiously and in accordance with longstanding Hippocratic principles, and to preserving public respect accorded to physicians as guardians of life and health.

Through their counsel, the parties have consented to the appearance of these *amici*.

SUMMARY OF ARGUMENT

The Oregon law challenged in this litigation not only authorizes and facilitates the assisted suicides of terminally ill patients, but affirmatively requires that physicians and other health care providers participate in such conduct in ways that violate their religious convictions. Those physicians and providers who fail to participate in the process of enabling suicide face a host of penalties -- criminal, civil, and administrative. The Ninth Circuit was wrong when it concluded that religiously-motivated physicians and health care institutions can simply ignore the Oregon law with impunity, and therefore lack standing. They cannot, and so their injury is real and immediate. The religious health care professionals and facilities must now alter their conduct and speech. Protected speech and practices are now jeopardized, and patients' lives are at risk.

We urge this Court to grant certiorari so that this unprecedented case can move forward on its merits.

ARGUMENT

The Need For Plenary Review By This Court Is Extraordinary And Immediate

This case presents two unprecedented questions: (1) whether terminally ill patients may challenge an Oregon law ("Measure 16") that deprives them of the same civil and criminal protections against assisted suicide that benefit all other citizens of the State, and (2) whether physicians and other health care professionals and facilities may challenge that law, which, in violation of their religious convictions and rights of association under the First Amendment and Religious Freedom Restoration Act, forces them both to engage in conduct that facilitates the killing of their own patients and to associate with others who assist patients in committing suicide. The case thus implicates constitutional values of the highest importance: life, free exercise of religion

(including the right of church self-governance), and the right of association.

The first of these values is thoroughly treated in the Petition for Certiorari and in the Brief *Amici Curiae* filed jointly by various disability groups. The amici herein, through previous submissions in cases currently pending before this Court, have also spoken in defense of the constitutional value accorded life in the face of a claimed "right" of assisted suicide. *See* Briefs Amici Curiae in *Washington v. Glucksberg*, No. 96-110 (U.S.), and *Vacco v. Quill*, No. 95-1858 (U.S.). The present brief aims to draw the Court's attention to the immediate and devastating impact Oregon Measure 16 has on the constitutional and statutory rights of physicians and other health care providers,[1] and to the "injury in fact" which they suffer because of it.

To say that the Ninth Circuit gave short shrift to these rights is to improve upon the treatment that the petitioners received in that court. Erroneously and without elaboration, the Ninth Circuit held that the petitioners "lack standing ... because Measure 16 does not provide for any penalty, criminal or otherwise," *Lee v. Oregon*, 107 F.3d 1382, 1391 (9th Cir. 1997), and that their claim was not ripe "[f]or the same reason." *Id.* The Court of Appeals wrote that the petitioners "have not identified any hardship that would befall them if their claims were not considered at this time." *Id.*[2] On the contrary, Measure 16

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[1]Among the many health care providers whose constitutionally protected rights of association and religious freedom are concretely infringed by Oregon Measure 16 are the petitioners, Dr. Gary Lee, Dr. William Petty, Maryville Nursing Home, Sister Geraldine Bernards as Maryville Nursing Home's administrator, The Willows Home, and Fritz and June Beck as the owners of The Willows Home.

[2]As to petitioner nursing homes and their administrators, the Court of Appeals stated only that "[b]ecause these plaintiffs

poses an immediate and direct threat to the very lives of the terminally ill and to the rights of their caregivers. Their injuries are real and immediate, warranting plenary consideration here and in the courts below.

I. Measure 16 Causes Injury To The Rights of Religious Health Care Providers And Institutions.

A. Measure 16 Burdens Rights Of Free Exercise And Association.

The truth of the adage that "rights often turn into duties" is manifest from Measure 16. While purporting to create a "right" to assisted suicide for terminally ill patients, Measure 16 *commands* physicians and other health care providers and institutions either directly to aid in suicide or permit suicide on their own premises; to associate with or allow within their organizational ranks physicians who aid suicides; and to cooperate in assisted suicides by transferring patient records to doctors willing to aid in suicide, providing personnel who will witness the execution of a written directive for aid in suicide, and informing patients of their "right" to assisted suicide -- all in violation of their First Amendment rights of free exercise and association and the Religious Freedom Restoration Act.

This infringement on associational rights and religious liberty occurs in at least four ways:

1. Although health care providers purportedly have no "duty" to participate in assisted suicide,[3] Measure 16 makes it impossible

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have not alleged that there are in fact any doctors at their facilities who will participate in Measure 16's procedures, there is no 'injury in fact' upon which to base standing." 107 F.3d at 1392.

[3]Measure 16, § 4.01(4), reprinted in Pet. App. 30a, states:

for any health care provider, institution, or professional organization to discipline or exclude from its ranks any doctor who assists in suicide, *even on its own premises*. Measure 16, § 4.01(2).[4] This means, for example, that if a staff physician assists a suicide on the premises of a Catholic hospital, the hospital -- notwithstanding sincerely-held religious convictions that forbid assisting a suicide -- can do nothing about it. Physicians with staff privileges at Catholic hospitals typically agree, as part of their contracts, to abide by Catholic ethical directives within the hospital. Thus, in a Catholic hospital, by virtue of his contract a physician may not assist in a suicide. Measure 16 unilaterally modifies and nullifies parts of those agreements by barring Catholic hospitals from censuring, disciplining, or rescinding the privileges of any doctor who assists in a suicide on their premises. Likewise, organizations morally and professionally opposed to assisted suicide, such as amicus Christian Medical & Dental Society, are forbidden under Measure 16 to exclude physicians who assist in suicide from their own membership.

> No health care provider shall be under any duty, whether by contract, by statute or by any other legal requirement to participate in the provision to a qualified patient of medication to end his or her life in a humane and dignified manner.

Section 4.01(4), of course, by its terms protects only those who refuse to participate "in the provision" of "medication," and its protections are therefore unavailable to the petitioners whose rights and consciences are violated in other ways.

[4]Section 4.01(2), reprinted in Pet. App. 30a, states:

> No professional organization or association, or health care provider, may subject a person to censure, discipline, suspension, loss of license, loss of privileges, loss of membership or other penalty for participating or refusing to participate in good faith compliance with this Act.

2. Measure 16 requires physicians knowingly to cooperate in assisted suicide by transferring medical records of suicidal patients to physicians they know will prescribe lethal drugs. Measure 16, § 4.01(4).[5] Physicians whose religious convictions prevent them from assisting a suicide are obligated to provide a physician with the records the latter needs to carry out his patient's death. This is akin to requiring that a person opposed on religious grounds to killing provide a would-be killer with directions to his intended victim's residence.

3. Measure 16 requires long term care facilities to cooperate in assisted suicide by appointing a witness to any resident's written request for suicide. Measure 16, § 2.02.[6] Absent a witness, there can be no assisted suicide. *Id.* Thus, long term care facilities with religious objections to assisted suicide are forced by Measure 16 to operate the regulatory machinery by which the patient's life is intentionally ended.

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[5]Section 4.01(4), reprinted in Pet. App. 30a, states:

> If a health care provider is unable or unwilling to carry out a patient's request [for assisted suicide] under this Act, and the patient transfers his or her care to a new health care provider, the prior health care provider shall transfer, upon request, a copy of the patient's relevant medical records to the new health care provider.

[6]Section 2.02(4), reprinted in Pet. App. 23a, states:

> If the patient is a patient in a long term care facility at the time the written request is made, one of the witnesses shall be an individual designated by the facility and having the qualifications specified by the Department of Human Resources by rule.

4. Measure 16 establishes assisted suicide as a legal "alternative" to curative or palliative treatment for terminally ill patients. Physicians in Oregon are required to inform their patients of such alternatives, Or. Rev. Stat. § 677.097, and even to describe it "in substantial detail" if the patient wants further information. *Id.* Suspension or loss of license awaits the physician who fails to discharge this duty. Or. Rev. Stat. § 677.190(18).

As petitioners have shown (Petition for Certiorari at 26-27), a person who fails to comply with Measure 16 in its various aspects is subject to criminal penalties. Those criminal sanctions in Measure 16 that are applicable to the forgery of a request for assisted suicide, § 4.02(1), and to coercion to commit an assisted suicide, § 4.02(2), "do not preclude criminal penalties applicable under other law for conduct which is inconsistent with the provisions of this Act." Measure 16, § 4.02(4), Pet. App. 31a. Under Oregon law, "[a]n offense defined by a statute of this state, but without specification as to its classification or as to the penalty authorized upon conviction, shall be considered a Class A misdemeanor." Or. Rev. Stat. § 161.555(3). Thus, Measure 16 explicitly contemplates criminal penalties for a violation of its requirements, and section 161.555(3) imposes such penalties. Failure to comply with Measure 16 also creates potential malpractice liability. Measure 16, § 4.02(3), Pet. App. 31a ("Nothing in [Measure 16] limits further liability for civil damages resulting from other negligent conduct or intentional misconduct by any person"). Thus, the health care provider who refuses to execute Measure 16 faces an array of sanctions -- administrative, criminal, and civil. The religious health care professionals and facilities must now alter their conduct and speech. Protected speech and practices are now being chilled.

The conflict between these several requirements of Measure 16 and the religious convictions of many physicians and health care institutions is profound and irreconcilable. In many religious traditions, as well as in the Hippocratic tradition of medical ethics, actions facilitating a patient's suicide involve moral complicity in killing and violate the physician's and institution's mission to serve the life and health of patients.

Abhorrence to any act that facilitates the suicide of any person is reflected in the Christian and Islamic traditions represented by the amici appearing here. By way of example, the Evangelical Lutheran Church in America in 1992 adopted a Message on End-of-Life Decisions in which it stated its "oppos[ition to] the legalization of physician-assisted death, which would allow the private killing of one person by another." The Evangelical Covenant Church has adopted ethical guidelines that state unequivocally that its hospitals and nursing homes "do not act in any way intentionally to cause, assist, or accelerate the deaths of patients."

For Catholic physicians and health care providers, "[t]o concur with the intention of another person to commit suicide and to help in carrying it out through so-called 'assisted suicide' means to cooperate in ... an injustice which can never be excused, even if it is requested." Pope John Paul II, Encyclical Letter *Evangelium Vitae* (*The Gospel of Life*), ¶ 66 (March 25, 1995). Such cooperation "can never be justified...." *Id.* at ¶ 74. Catholic health care professionals therefore have a religious right and duty "to refuse to take part in the phases of consultation, preparation, and execution of these acts against life...." *Id.* Catholic health care institutions "may never condone or participate in euthanasia or assisted suicide in any way." National Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* ¶ 60 (1995); *see also id.* ¶ 24 (Catholic health care providers are not to honor an advance directive that is contrary to Catholic teaching).

> Diverse religious traditions oppose assisted suicide and euthanasia because the practices violate the basic value of human life, seen as God's gift.... Many religious traditions reject assisted suicide and euthanasia based on their understanding of general values, including appreciation for the life and value of each individual, the individual's responsibility to the community, and society's obligations towards all of its members, especially the poor and vulnerable.... Differing religious perspectives also share a commitment to compassion for patients and others who are suffering. They believe that this compassion should be expressed by offering care and companionship, not assisted death or medical killing, to the severely ill.

New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* 90 (May 1994). These amici, like the citizenry they mirror in their religious convictions, share a common belief in the sanctity of life that unqualifiedly bars them from participating in the macabre machinery Oregon has put in place to end the lives of suicidal, terminally ill patients.

B. The Burdened Rights Are Protected Under The First Amendment And Religious Freedom Restoration Act.

Religious liberty is a fundamental constitutional value, protection of which is especially heightened when, as in this case, it is combined with other First Amendment rights. A law like Measure 16 that burdens *both* religious freedom and the right of association violates the First Amendment unless it is narrowly tailored to achieve a compelling state interest. *Employment Division v. Smith*, 494 U.S. 872, 882 (1990). Unless it meets the same test, a law that burdens religion, alone or in combination with other rights, also violates the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. § 2000bb, *et seq*.

Measure 16 fails on both counts. First, placing such extraordinary burdens on religious and associational rights serves no compelling interest. Religious freedom is "susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect," *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943), such as threats to life, health or property. *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *see Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination required over religious objection to preserve life and health of an entire community); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (government restrictions on child labor apply even when the labor is religiously motivated). Allowing physicians and other health care providers to refrain from cooperating in or facilitating suicides is certainly no threat to public health and safety. To the contrary, the integrity of the medical profession and the society served by it are gravely threatened by a regime in which doctors and health care institutions are *compelled*, as they are under Measure 16, to facilitate suicides in violation of their religious beliefs and associational rights.

Second, even if Measure 16 advanced some legitimate and truly compelling objective of government, which it does not, it is by no means narrowly tailored to achieve its ends. Oregon proffers no reason why doctors and health care providers morally opposed to killing must personally and institutionally act as accomplices to it.

The right of association is also a fundamental liberty, guaranteed by the First Amendment. *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958). Interference with such a right by the state is properly subject to the highest degree of scrutiny that a court can apply. *Id.* Here that freedom is coupled with the equally fundamental right of religious bodies to govern and organize themselves. *Watson v. Jones*, 80 U.S. 679 (1872); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952);

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). For the amici herein, health care is a ministry, part of their religious mission.[7]

"The right to organize voluntary religious associations ... is unquestioned." *Serbian Eastern Orthodox Diocese*, 426 U.S. at 711. Accordingly, it is the function of churches, not government, to determine the qualifications of those who carry out their ministry. *Gonzalez*, 280 U.S. at 16.

By robbing religiously-affiliated health care facilities of the right to extend staff privileges -- privileges that are voluntarily extended and voluntarily assumed -- only to those physicians who will act consistently with their mission, Measure 16 infringes upon the churches' rights of association and self-governance. "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts v.*

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[7]The Ethical and Religious Directives that guide Catholic health care ministry, for example, provide:

> The Church has always sought to embody our Savior's concern for the sick. The gospel accounts of Jesus' ministry draw special attention to his acts of healing....
>
> The mystery of Christ casts light on every facet of Catholic health care: to see Christian love as the animating principle of health care; [and] to see healing and compassion as a continuation of Christ's mission....

National Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* 3, 4 (1995).

United States Jaycees, 468 U.S. 609, 623 (1984). This Court has never required that the undesirable members be standing inside the organization's doors, *see* n.2 *supra*, before considering such a restriction.

II. The Injury Caused By Measure 16 Satisfies Requirements Of Standing And Ripeness.

Standing involves "a blend of constitutional requirements and prudential considerations." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). As this Court reiterated just this Term, to satisfy the requirement of standing, "a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997), *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Valley Forge*, 454 U.S. at 472. In the decision below, the Ninth Circuit held that the petitioners had failed to establish an injury in fact because "Measure 16 does not provide for any penalty, criminal or otherwise, for a violation of the challenged provisions." 107 F.3d at 1391.

The implication left by the Ninth Circuit's decision -- that petitioners are simply free to ignore the challenged provisions of Measure 16 with impunity, and so are not injured by its application -- is plainly wrong. First, as petitioners have shown, failure to comply with Measure 16 triggers criminal liabilities. *See* Petition for Certiorari at 26-27; Measure 16, § 4.02(4), Pet. App. 31a; Or. Rev. Stat. § 161.555(3). Second, any physician or health care provider who fails to carry out its provisions faces disciplinary sanctions by state regulators, including suspension or loss of license, as well as malpractice liability. Petition for Certiorari at 26-27; Measure 26, § 4.02(3), Pet. App. 31a. This Court has never required that a party be the current target of a pending criminal, civil, or administrative proceeding before it will

find standing. This is especially so when one is forced to forego the exercise of a constitutional right or face criminal liability. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), *quoting Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also Epperson v. Arkansas*, 393 U.S. 97 (1968).

The petitioners are on the horns of a dilemma. They must either comply with Measure 16 and violate their own constitutionally protected religious beliefs (a decision for which they believe they will be accountable to God), or face the threat of criminal penalties. Under those circumstances, there is unquestionably an injury sufficient to confer standing. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (standing is met where plaintiffs, "if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution").

Injury from threatened prosecution is only one injury visited upon these petitioners by Measure 16. Another is the forced association with physicians who assist their patients in committing suicide. Petitioners Maryville Nursing Home and The Willows Home are forced, by virtue of Measure 16, either to associate with (and, indeed, employ and pay) physicians who will assist in suicide, or risk the enforcement consequences. The fact that these facilities will be chilled in their right of association is itself an injury sufficient to create standing. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). This Court is so protective of the right of association that it even relaxes its usual standing requirements when necessary to prevent the chilling of that right. *Id.*; *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *United States v. Robel*, 389 U.S. 258 (1967).

Finally, for purposes of standing, Measure 16 creates an injury unique to the Free Exercise context. A regulation forcing one to engage in conduct contrary to one's religious beliefs may be sufficient, in and of itself, to confer standing. *School District of Abington v. Schempp*, 374 U.S. 203 (1963). The injury lies in the compulsion to do what one's religious convictions forbid. *See Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (a person "may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning ... the Free Exercise Clause"). Derogation of one's religious liberties is therefore sufficient injury in and of itself to warrant judicial review.

When challenges are raised to religious symbols and practices in public life, very little has been required for injury sufficient to create standing. The mere allegation that one has to take an alternate travel route to avoid seeing a religious display has been deemed enough to create an "injury" for standing purposes. *Harris v. City of Zion*, 927 F.2d 1401, 1405-06 (7th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992). This Court has even held that the loss of Medicaid funds to perform abortions is sufficient injury to create physicians' standing. *Singleton v. Wulff*, 428 U.S. 106, 112-113 (1976). The petitioners are not being asked to take an alternative travel route or accept fewer government payments for services they render. They are being forced, in violation of their religious convictions, to alter the way they practice medicine or face criminal, civil, and disciplinary sanctions. If having to drive down a different road or receive reduced government funding for one's services is enough to create an injury for the purpose of standing, then surely being forced to engage in practices which are inimical to the mission of religiously-motivated physicians and health care institutions creates such an injury.

This Court's most recent decision on standing is a reminder that prudential judgment, not hyper-technicality, informs its decision whether a government regulation, like the one at issue here, creates an injury in fact. *Bennett v. Spear*, 117 S. Ct. 1154, 1163-64 (1997) (irrigation districts and ranchers who alleged that the amount of water available to them would be reduced by the government's action alleged injury in fact even though, as the government had argued in that case, there was no demonstration that the petitioners would actually receive less water). The interests here in life, religious liberty, and rights of association and church self-governance occupy a far higher place in the constellation of rights than the private economic interests at issue in *Bennett*. Certiorari should be granted so that this Court can consider fully whether those heightened interests have been transgressed with sufficient concreteness, as we believe they have, to warrant a review of the merits by the lower courts.

For much the same reasons, the present case also presents a controversy that is ripe for resolution. Though conceptually distinct, the concept of ripeness parallels that of standing in important respects.[8] "[R]ipeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 201 (1983), *quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). This Court has long held that a regulated industry or profession does not have to violate a law and risk penalties before it can challenge the law under principles of ripeness. *Abbott Laboratories*, 387 U.S. at 148-49; *see also Babbitt*, 442 U.S. at 298 (one "does not have to await the

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[8] "Some of the cases expressly recognize that standing and ripeness theories often merge so closely that there is no reason to attempt separation." 13A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 3532.1 at 131 (2d ed. 1984) (citing cases).

consummation of threatened injury to obtain preventive relief"), *quoting Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). The penalties, described above, are real. The case is ripe. The stakes could not be higher. The "hardship to the parties of withholding court consideration," *Pacific Gas & Electric Co.*, 461 U.S. at 201, could not be more severe. If a health care provider is forced to wait until that moment when a doctor actually assists in a suicide on its premises, or a suicidal patient enters its doorway, before seeking judicial review, then its rights of free exercise and association will have already been violated. Clearly the patient's own rights and life will be extinguished forever.

Important prudential considerations counsel in favor of granting certiorari. If the petitioners are not allowed to go forward, then judicial review of the merits will be thwarted until that day when a health care facility or physician is subjected to prosecution or some other penalty for having failed to help one of his patients commit an assisted suicide. In *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), this Court was so concerned about the irreversible consequences of an erroneous decision about human life that it sustained a higher evidentiary threshold in cases involving termination of life-saving treatment for an incompetent patient. So too, denying certiorari in this case would be unfortunate and unwise, as the terminally ill and their caregivers will then be subjected to an unredressed violation of their constitutional rights. "In some circumstances, counter-vailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power...." *Warth v. Seldin*, 422 U.S. 490, 500-501 (1975). Those considerations should dispel any reluctance to exert judicial power in this case.

CONCLUSION

For the foregoing reasons, we urge this Court to grant the petition for certiorari and set this case for argument. The judgment of the Ninth Circuit should be reversed and the case should be allowed to proceed on the merits.

Respectfully submitted,

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